IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

VICKY SHERMAN,
Petitioner/Appellee,

and

JAMES SHERMAN,
Respondent/Appellant.

No. 2 CA-CV 2019-0084-FC
Filed August 4, 2020

Appeal from the Superior Court in Pima County
No. D20120372
The Honorable Renee T. Bennett, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 James ("Jim") Sherman appeals from the trial court's reduction of his spousal maintenance award, denial of his request for a retroactive increase in maintenance, and award of partial attorney fees in his favor. We affirm.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to sustaining the trial court's findings and will uphold them unless they are clearly erroneous or unsupported by the evidence." *In re Marriage of Priessman*, 228 Ariz. 336, ¶ 2 (App. 2011) (quoting *In re Marriage of Yuro*, 192 Ariz. 568, ¶ 3 (App. 1998)). In 2014, Jim and Vicky Sherman filed a consent decree dissolving their thirty-six-year marriage. Jim had previously been diagnosed with dementia that prevented him from being employed, and he had filed a social security disability claim that was pending at the time of dissolution. Under the marital settlement agreement (MSA) incorporated and merged into the decree, Vicky agreed to pay Jim $7,500 per month as modifiable spousal maintenance, "to be reduced by fifty percent (50%) of any amount Jim receives as Social Security disability income."

¶3 Vicky first requested modification of spousal maintenance in November 2015, claiming her resignation from her medical practice in Tucson and planned relocation to Indiana would result in decreased income. In April 2016, the trial court reduced maintenance from $7,500 to $6,500 per month, ordered Jim to "aggressively pursue" his social security disability claim, and ordered Vicky to provide documents evidencing her earnings from her employment in Indiana. The court also provided the

following updated formula for reducing maintenance if Jim was successful in obtaining a social security disability award:

> To the extent [Jim] receives such an award, the first $1,000 per month of that award will be credited entirely to [Jim], so as to bring him back to the level of income he had prior to this order. To the extent that additional monies are awarded to [him] from the social security administration, related to his disability claim, for purposes of accounting, the parties shall split such award on a 50/50 basis. In other words, if [Jim] is awarded an additional $1,000, [Vicky] shall be entitled to reduce her monthly payment to [Jim] by $500, or one half of the $1,000 award.

After this modification, Jim's social security disability claim was ultimately denied. He then applied for and began receiving social security retirement benefits in the amount of $1,834 per month.[1]

¶4 In June 2018, Vicky again requested modification, alleging there had been a "significant and ongoing change in circumstances" because her income had decreased since the 2016 modification, Jim was "capable of earning income through employment" based on the denial of his disability claim, and he was "now of an age where he can collect social security retirement payments." Jim filed a counterpetition alleging there had been a substantial and continuing change in circumstances because Vicky's income had *increased* above $325,000, the amount upon which the original maintenance award was based, and he was therefore entitled to an

[1]On appeal, Jim claims this amount is erroneous and that he only receives $1,784 per month in social security benefits. Although he was obligated to ensure the record included all transcripts and documents necessary for us to consider the issues raised, Jim did not order transcripts of any of the trial court proceedings as part of the record on appeal. *See* Ariz. R. Civ. App. P. 11(c)(1)(B) (appellant must include all relevant transcripts when contending a finding or conclusion is unsupported by or contrary to evidence). Because he failed to do so, "we assume the missing portions of the record would support the trial court's findings and conclusions." *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16 (App. 2003).

increase in maintenance retroactive to the 2016 modification. Jim also requested attorney fees and costs as a sanction for Vicky's failure to disclose her income from May 2016 to May 2017 as required by the 2016 modification ruling.

¶5 The trial court concluded Vicky had satisfied her burden of showing a substantial change in circumstances pursuant to A.R.S. § 25-327(A) based on Jim's "receipt of monthly Social Security benefits alone." In its consideration of the factors under A.R.S. § 25-319(B), the court found that Jim "is unable to be employed based on his mental condition," and that in 2016, and each year thereafter, Vicky's income had exceeded $325,000. The court denied Jim's request for a retroactive increase in maintenance and reduced Vicky's monthly payments to $5,800 beginning August 1, 2018, until January 1, 2020. Additionally, it ordered that, beginning January 1, 2020, Vicky's payments would be further reduced to "$5,800 minus ($1,070 minus [Jim]'s monthly cost of supplemental health care insurance)."

¶6 The trial court also found Vicky failed to provide financial disclosure as directed in the 2016 order and ordered her to pay $1,965 for Jim's attorney fees and costs directly related to obtaining such disclosure. Pursuant to A.R.S. § 25-324, the court awarded Jim $4,710 in attorney fees and $6,425 for costs directly related to Jim's neurological evaluation and testimony, both based on a "significant disparity in income." This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (2).

Discussion

Substantial and Continuing Change in Circumstances

¶7 On appeal, Jim argues "[t]he trial court made an error of law by modifying [his] indefinite spousal maintenance as there was no change in circumstances unanticipated by the parties when the decree was entered." A court's decision as to the sufficiency of changed circumstances to support a modification of spousal maintenance will not be disturbed on appeal absent an abuse of discretion. *Fletcher v. Fletcher*, 137 Ariz. 497, 497 (App. 1983). A court abuses its discretion when it fails to consider the evidence, its findings are not supported by substantial evidence in the record, or where it commits an error of law in reaching its conclusion. *Walsh v. Walsh*, 230 Ariz. 486, ¶ 9 (App. 2012). The burden of proving changed circumstances necessary to modify an award of spousal maintenance is on the party seeking modification. *McClendon v. McClendon*, 243 Ariz. 399, ¶ 9 (App. 2017).

¶8 Section 25-327(A) provides, in relevant part, that "the provisions of any decree respecting maintenance or support may be modified or terminated only on a showing of changed circumstances that are substantial and continuing." Modification cannot be based on conditions that were reasonably anticipated when the parties' decree was entered. *Marquez v. Marquez*, 132 Ariz. 593, 595 (App. 1982); *see also Alford v. Alford*, 18 Ariz. App. 1, 2 (1972) ("The future realization of conditions which could be reasonably anticipated by the parties at the time of their initial agreement cannot be considered as evidence of changed circumstances justifying a modification of the initial decree."), *overruled on other grounds by In re Marriage of Rowe*, 117 Ariz. 474 (1978). The moving party must prove circumstances have sufficiently changed by a comparison with either the circumstances existing at dissolution, *MacMillan v. Schwartz*, 226 Ariz. 584, ¶ 12 (App. 2011), or, if the court has modified the original decree, the circumstances existing at the issuance of "the latest court order," *McClendon*, 243 Ariz. 399, ¶ 10.

¶9 Here, the dissolution decree states, under the paragraph titled "Jim's Social Security Disability Claim," "[t]he parties acknowledge that Jim's fiduciary . . . has filed a claim for Social Security Disability which is presently pending" and that "[a]ll prospective Social Security benefits received . . . shall be used . . . for his reasonable and necessary monthly living expenses, and the spousal maintenance obligation owed by Vicky shall be reduced by fifty percent (50%) of the award." It also provides that "Vicky shall pay to Jim, as modifiable spousal maintenance, the sum of seven thousand five hundred dollars ($7,500) per month, to be reduced by fifty percent (50%) of any amount Jim receives as Social Security disability income." The 2016 modification provides that, "[t]o the extent [Jim] receives [a social security disability] award, the first $1,000 per month of that award will be credited entirely to [Jim]." And, "[t]o the extent that additional monies are awarded to [Jim] from the social security administration, related to his disability claim, for purposes of accounting, the parties shall split such award on a 50/50 basis."

¶10 Jim claims the trial court's 2019 finding of changed circumstances based solely on his receipt of monthly social security benefits was erroneous because the receipt of such benefits "was not only anticipated when the Decree was entered, but the resulting reduced amount of maintenance was also specified in the MSA." Jim asserts the decree "clearly state[s] once [he] commenced receiving **any** social security, Vicky's monthly obligation would be reduced by 50% of the monthly amount [he] receives." Vicky counters that "receiving Social Security Benefits[,] . . . without more, has been sufficient to show a change in circumstances,"

citing *Jenkins v. Jenkins*, 215 Ariz. 35, ¶ 16 (App. 2007), and *Hurd v. Hurd*, 223 Ariz. 48, 52 (App. 2009).[2] However, neither *Jenkins* nor *Hurd* discusses social security benefits, let alone in the context of substantially changed circumstances under § 25-327(A), and Vicky fails to meaningfully counter Jim's argument.

¶11 Nevertheless, neither party addresses on appeal the difference between the social security *disability* benefits discussed in the dissolution decree and 2016 modification and the social security *retirement* benefits actually received by Jim.[3] Although the parties expressly contemplated Jim's receipt of disability benefits, based on the record before us, the evidence does not show that the parties anticipated his receipt of social security benefits unrelated to his disability claim. Indeed, contrary to Jim's argument, both the original decree and the initial modification discuss only benefits related to his disability claim. Notably, the provision that states Vicky's maintenance obligation "shall be reduced by fifty percent (50%) of the award" based on "[a]ll prospective Social Security benefits received" appears under the paragraph titled "Jim's Social Security Disability Claim."

¶12 And, as noted, because Jim has not provided us with transcripts of the proceedings below, we assume such transcripts would support the trial court's conclusion that Vicky had satisfied her burden of proving changed circumstances sufficient to support modification. *See State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16 (App. 2003). On this

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[2]Vicky also alleges Jim makes false statements of fact unsupported by the record on appeal. For example, she challenges Jim's assertion that she was "one of the highest-paid obstetricians in Tucson," and that she "gave away" her practice. However, because these facts are immaterial to our disposition, we do not address her argument.

[3]To qualify for social security *disability* benefits, an applicant must meet certain medical requirements and be "'insured,' meaning that [the applicant] worked long enough . . . and paid Social Security taxes on [their] earnings." *Disability Benefits*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits/disability/ (last visited July 21, 2020). In contrast, to qualify for social security *retirement* benefits, an applicant must be at least sixty-two years old and have worked for a minimum of approximately ten years. *Learn About Retirement Benefits*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits/retirement/learn.html (last visited July 21, 2020).

record, we cannot conclude the court abused its discretion in finding a substantial change in circumstances based solely on Jim's receipt of social security *retirement* benefits. *See Jorgensen v. Jorgensen*, 131 Ariz. 271, 273 (App. 1981) (modification allowed because subsequent change in income "was not within the contemplation of the parties at the time of their separation agreement").

¶13 Additionally, Jim argues the trial court's modification runs afoul of the principles established in *Schroeder v. Schroeder*, 161 Ariz. 316 (1989), because it "failed to consider the parties' justifiable expectations set forth in the MSA and the Consent Decree" and failed to give effect to the 2016 ruling. The *Schroeder* court considered "the purpose for spousal maintenance, the justifiable expectations of the parties, and the trial court's obligation to give effect to its orders" in determining whether a court may modify the length of a maintenance order that awards a monthly amount for a limited time period but is silent as to modifiability. *Id.* at 317, 320. The parties disagree about the applicability of *Schroeder* to this case. However, based on our conclusion that the social security disability benefits contemplated in the original decree and 2016 ruling differ from the social security retirement benefits Jim actually receives, Jim's argument fails.

¶14 Next, Jim contends the trial court improperly reduced his future maintenance based on anticipated decreases in his health insurance costs because any savings based on his future Medicare benefits were speculative. He further asserts that any savings were "de minimus" compared to Vicky's income and were reasonably foreseeable at the time of the dissolution and therefore cannot constitute a substantial change in circumstances.

¶15 After finding that a substantial and continuing change in circumstances exists, a trial court must analyze the factors set out in § 25-319(B) to determine the appropriate amount and duration of spousal maintenance in light of the changed circumstances. *Scott v. Scott*, 121 Ariz. 492, 495 n.5 (1979) (factors to be considered in determining whether to modify spousal maintenance award are "the same . . . factors taken into consideration when granting an award for support and maintenance"). One of these factors is "[t]he cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought if the spouse from whom maintenance is sought is able to convert family health insurance to

employee health insurance after the marriage is dissolved." § 25-319(B)(12).[4]

¶16 In its consideration of this factor, the trial court stated that, at the time of its ruling, Jim was paying $1,070 per month for health insurance, but upon his eligibility for Medicare, his payments would be reduced by approximately $270 to $370 per month. After considering all the § 25-319(B) factors, the court concluded Vicky was "entitled to a further modification of . . . spousal maintenance beginning January 1, 2020 based on [Jim]'s Medicare health care coverage which shall take effect in November 2019." The court provided the following formula for calculating the additional reduction in Vicky's monthly maintenance payments: "$5,800 minus ($1,070 minus [Jim]'s monthly cost of supplemental health care insurance)."

¶17 Jim argues this modification was improper because he was not yet eligible for Medicare at the time of the modification, and any savings as to the cost of his health insurance were speculative and merely an estimate. Although "[t]he court was obligated to assess maintenance based on the parties' historic and existing circumstances, not on speculative predictions about the future," *Sherman v. Sherman*, 241 Ariz. 110, ¶ 19 (App. 2016), the formula it provided for calculating the reduction in maintenance was not speculative. Indeed, the formula was not based on the estimated reduction in Jim's health insurance costs, but instead provided for calculation of the actual amount of Jim's savings and was conditioned upon the realization of such savings. Accordingly, we find no abuse of discretion.[5]

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[4]Jim appears to argue the trial court's findings under § 25-319 were "superfluous to the relevant issues" and many of the findings "were anticipated by the parties prior to the entry of the Decree" and therefore should not have been considered. Jim does not develop this argument, and we generally decline "to address issues that are not argued adequately, with appropriate citation to supporting authority." *In re J.U.*, 241 Ariz. 156, ¶ 18 (App. 2016); *see* Ariz. R. Civ. App. P. 13(a)(7)(A) (argument must contain supporting reasons for each contention with citations of legal authorities).

[5]Further, as noted, the trial court found Jim's receipt of social security retirement benefits was a substantial and continuing change in circumstances under § 25-327(A) that warranted modification of his spousal maintenance award. Because Vicky met her burden of establishing a substantial and continuing change in circumstances through Jim's receipt

¶18 Jim also argues that under the "law of the case doctrine," the 2016 ruling "should have guided the 2019 determinations related to the parties' incomes and maintenance," and the trial court erred by "reopening the issues regarding spousal maintenance that had been agreed upon by the parties in the MSA, namely that [he] was permanently precluded from working." The law-of-the-case doctrine "describes the judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court" so long as the essential facts, issues, or evidence do not substantially change. *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278-79 (App. 1993). "When, as in this case, [the doctrine is sought to be applied] to decisions of the same court, we treat law of the case as a procedural doctrine rather than as a substantive limitation on the court's power." *Id.* at 278.

¶19 Because spousal maintenance can be modified only if there is a substantial and continuing change in circumstances, § 25-327(A), the facts involved in modification proceedings will necessarily differ from the facts underlying a prior ruling. Accordingly, Jim's argument is unavailing. *See Powell-Cerkoney*, 176 Ariz. at 279 ("[C]ourts must not afford . . . procedural doctrine [of law-of-the-case] undue emphasis."). Further, as Vicky notes, Jim did not argue the trial court was precluded from deciding whether he was capable of working based on the law of the case below, but instead obtained a neuropsychological evaluation and presented evidence that he is incapable of working. We will not address arguments made for the first time on appeal. *See Henderson v. Henderson*, 241 Ariz. 580, ¶ 13 (App. 2017) ("Because this argument is raised for the first time on appeal, we would normally find it waived."); *Cullum v. Cullum*, 215 Ariz. 352, n.5 (App. 2007) ("As a general rule, a party cannot argue on appeal legal issues not raised below.").

Retroactive Modification of Spousal Maintenance

¶20 Jim challenges the trial court's denial of his request for a retroactive increase in spousal maintenance payments based on Vicky's actual earnings between May 2016 and May 2017, claiming "[t]he court left the determination of both parties' future actual incomes open for a retroactive remedial measure, subject to review on or after May 1, 2017." Jim asserts he "should be awarded a retroactive resumption of the original

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of social security retirement benefits, whether Jim's future Medicare eligibility constitutes such a change is irrelevant.

$7,500 maintenance award back to May 2016, the effective date of [the court's] [r]uling."

¶21 In 2016, the trial court decreased Jim's maintenance award by $1,000 per month, stating:

> It is intended that this award be subject to review on or after May 1, 2017. At that time, if either party seeks a review, the Court will undertake to determine what [Vicky]'s *actual* income was for the period [of] May 1, 2016 through May 1, 2017 and compare that to [Vicky]'s "base" salary of $325,000 per year.

In 2019, after considering, among other factors, Vicky's ability to pay and Jim's reasonable needs, the court found that "reverting to $7,500.00 per month in spousal maintenance is not supported by the evidence."

¶22 Generally, we review a trial court's decision as to modification of spousal maintenance for an abuse of discretion. *Priessman*, 228 Ariz. 336, ¶ 12. Here, however, we lack authority to address Jim's argument. Section 25-327(A) provides that the maintenance provisions of a divorce decree may be modified "except as to any amount that may have accrued as an arrearage before the date of notice of the motion . . . to modify or terminate." "Thus, spousal maintenance payments become vested and non-modifiable when they are due," and may not be retroactively modified. *Priessman*, 228 Ariz. 336, ¶ 13; *see also Jarvis v. Jarvis*, 27 Ariz. App. 266, 267-68 (1976) (installments of spousal maintenance establish rights and duties of parties when they become due). Generally, modifications are effective "the first day of the month following notice of the petition and never before the filing date of the petition." *Priessman*, 228 Ariz. 336, ¶ 13; § 25-327(A).

¶23 In this case, the spousal maintenance payments that had accrued before Vicky's June 2018 petition were vested when due and not subject to modification. Because the trial court had no authority to order a retroactive increase of spousal maintenance as requested in Jim's August 2018 counterpetition filed under § 25-327, we cannot address such issues on an appeal from the resulting judgment. *Cf. McHazlett v. Otis Eng'g Corp.*, 133 Ariz. 530, 533 (1982) ("If a lower court has no jurisdiction to issue an order[,] an appeal from that order gives the appellate court no jurisdiction except to dismiss the appeal.").

¶24 To the extent Jim challenges the trial court's 2016 reduction in maintenance, we do not address any alleged error because he failed to appeal from that judgment. *See* Ariz. R. Civ. App. P. 9(a) (party must file notice of appeal within thirty days of entry of judgment); *In re Marriage of Thorn*, 235 Ariz. 216, ¶ 5 (App. 2014) ("[T]his court only acquires jurisdiction over those matters identified in a timely filed notice of appeal.").

Attorney Fees at Trial

¶25 Jim challenges the trial court's partial award of attorney fees in his favor under § 25-324, arguing that "absent Vicky's refusal to provide her income records and her claim [that] Jim was able to work, the entire litigation should not have ensued." Specifically, he asserts that "despite Vicky's substantial monthly income and financial resources, the court only awarded [him] $4,710.00 in legal fees," and that "the $4,710 fee equates to 15.7 hours of services, which was less than the amount of time [his attorney] actually spent in the courtroom representing [him]."[6] We will not disturb an award of attorney fees made pursuant to § 25-324 absent an abuse of discretion. *Mangan v. Mangan*, 227 Ariz. 346, ¶ 26 (App. 2011).

¶26 Section 25-324(A) provides that a trial court may award reasonable attorney fees after consideration of the parties' financial resources and the reasonableness of their positions taken throughout the proceedings. As the statutory language indicates, the court has "discretion to deny a fee request even after considering" both the financial resources of the parties and the reasonableness of their positions. *Myrick v. Maloney*, 235 Ariz. 491, ¶ 9 (App. 2014). In addition, the court may only award a "reasonable amount" in fees and costs. § 25-324(A).

¶27 In this case, the trial court found that there was a substantial disparity in the parties' financial resources based on the fact that Vicky "has considerably more resources available," and that she had not taken an

[6]The trial court also awarded Jim $6,425 under § 25-324 for costs related to his 2018 neurological evaluation and testimony and $1,965 as a sanction against Vicky under Rule 65(b), Ariz. R. Fam. Law P., for failing to disclose financial information as ordered. Jim does not challenge the award related to his evaluation, but asserts, for the first time in his reply brief, that "the reimbursement of $1,965 was paltry, particularly considering that the disclosure delay was intentional and in defiance of the court's clear and concise 2016 Order." "Arguments raised for the first time in a reply brief are deemed waived," *In re Marriage of Pownall*, 197 Ariz. 577, n.5 (App. 2000); therefore, we do not address this argument.

unreasonable position in the litigation. Jim disputes the court's finding that Vicky's position was not unreasonable because it does not align with the court's other findings that she had "fail[ed] to provide disclosure as directed by the Court on April 12, 2016," "the two main allegations [she] relied on in support of her petition to modify were proven false," and she had been in arrears with her maintenance payments despite having a large average monthly balance in her bank accounts.

¶28 Although a trial court is required to consider both the financial circumstances and the reasonableness of the parties before deciding to grant attorney fees, it may do so based on evidence supporting either circumstance. *Magee v. Magee*, 206 Ariz. 589, n.1 (App. 2004); *see also* § 25-324(A). Here, the court considered both of these factors before awarding Jim a portion of his fees based on disparity of financial resources—not the parties' reasonableness. And, the trial court is in the best position to "weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4 (App. 2002). Moreover, as noted, in the absence of a transcript, we assume the evidence supported the court's findings. *See Burton*, 205 Ariz. 27, ¶ 16.

¶29 Jim asked the trial court to award him $28,560 in attorney fees, but after reviewing Jim's financial affidavit and related responses, the court awarded him $4,710 in attorney fees under § 25-324(A). The court had discretion to determine a "reasonable amount" of fees in this case, and we cannot say the court abused its discretion in awarding Jim only $4,710 of the $28,560 he requested. *See Mangan*, 227 Ariz. 346, ¶¶ 26-27 (quoting § 25-324(A)).

¶30 Jim also alleges Vicky "advanced factually unsupported positions, protracting the action, and causing Jim to incur significant fees, facts which the trial court afforded no weight," and claims the court ignored his financial affidavit showing a balance of $93,000 in attorney fees incurred as to the dissolution and Vicky's first petition to modify maintenance. Further, he asserts the court ignored calculations showing an excess of $14,555 in Vicky's monthly income after her expenses and Jim's maintenance were paid. To the extent Jim asks this court to reweigh the evidence, we will not do so, *see Hurd*, 223 Ariz. 48, ¶ 16, and we presume the court considered all admitted evidence, *see Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18 (App. 2004). Nothing in the record suggests the court ignored this evidence; indeed, the court found a substantial disparity in the parties' resources after considering, among other things, Jim's financial affidavit

and his reply to Vicky's opposition to his affidavit, which included the $14,555 calculation.

¶31 Jim further argues the trial court abused its discretion by failing to reimburse him for costs related to his expert witness. Although the expert did not testify because his proposed testimony would have duplicated the testimony of Vicky's expert, Jim argues that "his assistance and trial preparation fees are legitimate costs that should be awarded to [Jim]," and that "if Vicky had simply provided her income documents," the expert's services "may not have been needed."[7] However, Jim does not make any discernible legal argument, nor does he cite any supporting legal authority to show that the court erred in declining to award the expert witness fee. Therefore, this argument is waived. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (appellant's opening brief must contain "contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities"); *In re J.U.*, 241 Ariz. 156, ¶ 18 (App. 2016) ("We generally decline to address issues that are not argued adequately, with appropriate citation to supporting authority.").

¶32 Finally, Jim asks us to direct the trial court to consider designating Vicky a "vexatious litigant" under A.R.S. § 12-3201(A) and (B) in order to discourage her from initiating "future unfounded litigation." He claims that, although he did not argue Vicky was a vexatious litigant below, the court's failure to evaluate her conduct "within the purview of A.R.S. § 25-324" was an abuse of discretion and his award of attorney fees should be vacated and remanded for "a proper calculation." Under § 12-3201(A), "at the request of a party or on the court's own motion, the presiding judge of the superior court . . . may designate a pro se litigant a vexatious litigant." Vicky was represented by counsel below and thus was not a "pro se litigant." Therefore, this statute is inapplicable and the court's failure to designate Vicky a vexatious litigant does not constitute an abuse of discretion.

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[7]Vicky does not address Jim's argument in her answering brief. Although we could consider her failure to respond to Jim's argument a confession of reversible error, *see Chalpin v. Snyder*, 220 Ariz. 413, n.7 (App. 2008), "[t]his doctrine is discretionary . . . and we are reluctant to reverse based on an implied confession of error," *Nydam v. Crawford*, 181 Ariz. 101, 101 (App. 1994). In our discretion, we decline to regard this as a confession of error. *See Thompson v. Thompson*, 217 Ariz. 524, n.1 (App. 2008).

Attorney Fees

¶33 Both parties request attorney fees on appeal pursuant to § 25-324. After considering the parties' financial resources and the reasonableness of their respective positions, we decline to award attorney fees to either party. As the prevailing party on appeal, we award costs to Vicky upon her compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶34 For the foregoing reasons, we affirm the trial court's modification of spousal maintenance, denial of Jim's request for retroactive modification, and award of attorney fees.